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497-028—73——1

CHRONOLOGICAL LISTING OF RELEVANT DOCKET ENTRIES

May 26, 1970	Indictment returned and filed in District Court.
Feb. 9, 1971	Counsel appointed for defendant. Defendant entered a plea of not guilty. Cause set for trial for March 29, 1971.
Feb. 19, 1971	Defendant filed a motion to dismiss the indictment for lack of prosecution.
Mar. 18, 1971	Called for Hearing on Defendant's Motion to Dismiss the Indictment Because of Insufficient Evidence Before the Grand Jury and Defendant's Motion to Dismiss The Indictment for Failure of a Speedy Trial. Counsel's arguments heard. Both Motions are Denied.
Mar. 29, 1971	Jury trial commenced and completed. Verdict of jury found defendant guilty as charged in the indictment.
May 4, 1971	Defendant Sentenced To the Attorney General of the United States For a Period of Five Years. Sentence to Run Concurrently With The Sentence Now Being Served In The Nebraska State Penitentiary.
May 18, 1971	Notice of appeal filed.
Aug. 16, 1972	Opinion of Court Appeals.
Aug. 17, 1972	Mandate received by District Court, remanding with directions to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment.
Aug. 29, 1972	Order entered by District Court instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and date of arraignment, a total of 259 days, the credit being applied to the sentence of imprisonment for a period of five years imposed in the District Court on May 4, 1972 [sic].

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–5521

CLARENCE EUGENE STRUNK, PETITIONER

v.

UNITED STATES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In the United States District Court for the Eastern District of Illinois

Document No. 13

Criminal No. 70–44

Section 2312, Title 18, United States Code

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER, DEFENDANT

Notice of Motion Seeking Order Dismissing Indictment for Failure to Prosecute—Filed February 17, 1971

Defendant shows to the Court:

1. The indictment against him was returned on May 26, 1970.

2. He was arrested on July 23, 1969, and has remained in custody to the present time.

3. His whereabouts have been known to the United States Attorney throughout this period.'

4. At all times since his arrest defendant has been ready for trial and has repeatedly requested that the proceeding be brought to trial;

5. The United States Attorney for the Eastern District of Illinois has failed and refused to permit the defendant to be brought to trial;

WHEREFORE, defendant moves that the indictment herein be dismissed for unnecessary delay in bringing the defendant to trial.

Dated: February 18, 1971.

(S) A. WENDELL WHEADON,
Attorney for Defendant, Welch, Wheadon & McCaskill, 310 N. 10th Street, Suite 100, East St. Louis, Illinois 62201—(618)274-4010.

[Proof of Service omitted in printing]

In the United States District Court for the Eastern District of Illinois

Document No. 14

Criminal No. 70-44

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER, DEFENDANT

Memorandum in Support of Defendant's Motion To Dismiss—Filed February 19, 1971

Comes now the defendant, CLARENCE EUGENE STRUNK, also known as ALBERT GARDNER WAGNER, by and through his attorney, A. WENDELL WHEADON, in the above entitled action and requests this Honorable Court to dismiss the indictment currently on file against him at this time in the United States Attorney's office, Eastern District of Illinois. In support thereof, the defendant submits the following memorandum:

The lengthy and continuing failure of the United States Authorities to prosecute the criminal charge against him in this case has violated and is violating his constitutional rights to a speedy trial as guaranteed in the Sixth and Fourteenth Amendments to the United States Constitution. Specifically the defendant contends:

1. The rights to a speedy trial is a federal constitutional right and, accordingly, must be enforced on the basis of federal, as opposed to state, standards;

2. The right to a speedy trial accrues to one incarcerated in a prison of another jurisdiction regardless of his demand on his part, and the right is not waived from mere silence or inaction by the prisoner;

3. The application of federal standards insuring the right to a speedy trial compels the conclusion that the Defendant's right to a speedy trial was violated and is being violated in this case.

A. The Right to a Speedy Trial—A Federal Constitutional Right

In 1967 the United States Supreme Court lifted the right to a speedy trial from a previously assigned second-class stature by recognizing that it was "one of the most basic rights preserved by our Constitution. *Klopfer* vs. *North Carolina*, 386 U.S. 213, 226 (1967)" Klopfer had been indicted on a North Carolina criminal trespass charge arising out of a civil rights demonstration. After his trial ended in a mistrial, the case was postponed for two terms. The trial court, over Klopfer's objection, then granted the prosecutor's motion for a "*nolle prosequi* with leave" a procedural device in use only in North Carolina whereby the accused is discharged from custody but remains subject to prosecution at any time in the future at the discretion of the prosecutor. The United States Supreme Court held that by indefinitely postponing prosecution of the indictments, the state denied Klopfer the right to a speedy trial guaranteed to him by the Sixth Amendment to the United States Constitution, which the Court made expressly applicable to the States under the Fourteenth Amendment to the United States Constitution.

The Defendant concedes that prior to *Klopfer* there was a tendency on the part of various state courts to emphasize the relativity of the right to such other factors as comity, dual

sovereignty, punishment, convenience and cost. See 77 Yale L.J. 767, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions* (1968).

The rationale of comity and dual sovereignty, however, holds little weight in this day and age, particularly with reference to a basic constitutional right. As recently stated in 77 Yale L.J. 767, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, at 771–72 (1968):

> While such notions of sovereign dignity are anachronistic, the argument may have had some practical basis in the past when extradition was at best a tricky affair. Extradition procedures were complicated, and it was often held that a state permanently waived jurisdiction over a convict whom it released into the custody of another state. However, the Uniform Criminal Extradition Act, now in force in all but six states, today provides for a safe and simple extradition procedure between states. Statutory and case law has similarly simplified the process of granting temporary custody between state and federal jurisdictions. These procedural reforms leave little force in an argument which elevates the small danger of a rebuff of one sovereign by another above the concrete evils which can result from denial of a speedy trial.

Recently in *Richardson* vs. *State*, 428 P. 2nd 61 (Idaho 1967), the Supreme Court of Idaho addressed itself to the issue of a state's duty to initiate procedures for the return of a prisoner to the state for purpose of trial, and expressly rejected the dual sovereignty rationale. In the course of its opinion the Court quoted with approval the following from *Commonwealth* vs. *McGrath*, 348 Mass. 749, 205 N.E. 2d 710 (1965):

> The decisions which have adopted a contrary position are unconvincing. Some of them reason that a State need not request the delivery of a person incarcerated elsewhere because it cannot demand his custody as a matter of unqualified right. But we fail to see why the lack of an absolute right excuses the exercise of due diligence. Other decisions are based on the notion that the defendant's absence from jurisdiction is the result of his own wrongdoing. This, however, is not a situation where the accused is voluntarily remaining without the Com-

> monwealth. Nor is it a case where the Federal authorities have refused to release him. * * * Here, the delay in the trial of the defendant for a crime of which he is presumed innocent can be prevented.

Although notions of dual sovereignty have in the past been used as a basis for denial of one's right to a speedy trial, one author submits that the real reason for delaying the trial of a convict in another jurisdiction are punishment, convenience and cost. 77 Yale L.J. 767, 772–73, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions* (1968) deposes of the reasons as follows:

> Apart from conceptualism and lingering fictions, the true reasons for delaying trial of convicts in other jurisdictions are punishment, convenience and cost. Punitive motives often predominate. One prosecutor wrote that a convict could "sit and rot in prison" rather than be brought promptly to trial in the prosecutor's jurisdiction. Presumably most prosecutors are not so callous, but many prosecutors are doubtless little troubled by the realization that delay causes anxiety, makes convict's eventual defense more difficult, and eliminates the possibility of concurrent sentences. Many detainers are apparently filed for punitive reasons; they are withdrawn shortly before the convict's release, having served their purpose by curtailing prison privileges and preventing parole. Satisfaction of the punitive impulse is, of course, no justification for permitting prosecutors to delay trials of convicts in other jurisdictions.
>
> In addition to satisfying the retributive urge, delaying the trials of convicts in other jurisdictions is convenient for overworked prosecutors who welcome the chance to postpone some cases on a typically crowded docket. Yet docket-lighting considerations do not override the right to a speedy trial of other defendants; there seems no good reason why it should relieve prosecutors of the obligation to try convicts in other jurisdictions promptly.
>
> Finally, the majority rule is rationalized on the grounds that securing temporary custody of the defendant and transporting him to and from trial costs money. Extending the right to a speedy trial to convicts in other jurisdictions would force the accusing jurisdiction to spend this money or drop the case.

The costs of temporary extradition usually are not substantial, however, and the accusing jurisdiction will face many of the same costs if it brings the convict to trial *after* his sentence in the other jurisdiction has run. Moreover, if the convict can serve his sentences concurrently, the total cost of his imprisonment and rehabilitation will often be much smaller. Even aside from this possibility, however, recognition of the right to a speedy trial will certainly cost less than the enforcement of other rights, such as the right to counsel, which can no longer be distinguished as more "basic" after *Klopfer*.

As a further reason for delaying prosecution of convicts in other jurisdictions—particularly in those cases of the so-called "white collar" crimes where monetary loss is involved—the Defendant cites his desire for restitution on the parts of many prosecutors. Where there is substantial evidence of guilt, where the charges represent one episode in a series of similar episodes involving other jurisdictions, and where the accused has already been incarcerated in one of the other jurisdictions, frequently the best interests of justice and society may be served by the payment of restitution in lieu of prosecution. In the case of the indigent defendant, however, this may well create a dilemma: he is willing to make restitution but has no source of income outside of prison earnings. Sufficient prison earnings, in turn, are dependent upon the prisoner's eligibility for work release programs which are available in many states and the eligibility is denied by the custodial restrictions imposed by the detainer or warrant. Clearly, then, the solution must lie in the application of the federal speedy trial rationale so that the accused may receive a concurrent sentence (thereby removing the custodial restrictions of the detainer or warrant) or a probationary sentence with restitution as a condition of probation. Even a more obvious solution would be the removal of the warrant or detainer (but not the cancellation of the charge) so that restitution could be made without the expense of trying the prisoner. To deny a prisoner access to any of these three remedial avenues for a substantial period of time is not only to deprive him of his rights to a speedy trial but also to lessen the possibility of restitution to the concerned jurisdiction.

B. THE ABSENCE OF DEMAND AND THE ISSUE OF WAIVER

The Defendant concedes that since he has been incarcerated in the Nebraska Penal Complex from September 1969, to date, he has made no formal demand upon this court to furnish him a speedy trial. The issue of whether a demand by an out-of-state prisoner is necessary to preserve his constitutional right to a speedy trial is really the issue of whether inaction or silence constitutes a waiver of that right.

The constitutional right to a speedy trial does not germinate from a written or oral request from an out-of-state prisoner; the right pre-exists any act of the accused with reference to the right. Fundamental principles of constitutional doctrine are applicable here. A valid waiver is never presumed simply from the silence of an accused. *Miranda* vs. *Arizona*, 384 U.S. 436 (1966). As stated in the Supreme Court in *Carnley* vs. *Cochran*, 369 U.S. 506, 516 (1962):

> Presuming waiver from a silent record is impermissible. * * *

The issue of waiver by non-demand on the part of an out-of-state prisoner was before the Court in *United States* vs. *Chase*, 135 F. Supp. 230 (N.D. Ill. 1955):

> In summary, petitioner has not by mere knowledge (if he had it) waived his constitutional right to a speedy trial. The stakes are too high to apply a waiver without some overt act on his part. * * * Further, a waiver will not be implied when the action required to avoid it is virtually impossible.
>
> While it is easy to say that a man confined to Alcatraz should take active steps in his own behalf, there are practical obstacles in his path which make it easier to say than to do. Accordingly, the requirements of demanding a speedy trial, and his failure to take action, will not be construed as a waiver of his rights.

Also see *People* vs. *Winfrey*, 281, N.Y.S. 2d 823 (Ct. of App. N.Y. 1967); *Pitts* vs. *North Carolina*, 395, F. 2d 182 (4th Cir. 1968).

The constitutional right to a speedy trial applies to both the pre-charge stage (the time between detainer and trial) and the post-charge stage (the time between information or indictment and trial). *Keller* vs. *United States*, 238 F. 2d 259 (Ct. App. D.C.

1956); *People* vs. *Winfrey*, supra. A demand by an out-of-state prisoner is unnecessary to the attachment, preservation or perfection of that right. The right therefore is not waived by silence or inaction on the part of the accused, in prison out of state.

Nor is it necessary that the accused must show actual prejudice by the delay. In *Klopfer* vs. *North Carolina*, 386 U.S. 213 (1967), the Court made no reference to any factor caused by the delay which might prejudice Klopfer's defense. Nor do the circumstances of Klopfer suggest any prejudice which might occur. Rather, the finding that the delay denies Klopfer his right to a speedy trial stems solely from the oppression caused by the prosecutor's power to delay trial and the anxiety and concern associated with a public criminal charge.

Where the delay is substantial, prejudice is presumed. As stated in *Commonwealth* vs. *Green*, 234 N.E. 2d 534 (Mass. 1968):

> Under the * * * mandate of the Sixth Amendment of the Constitution of the United States, it has been held that prejudice need not be affirmatively shown.

See also *United States* vs. *Lustman*, 258 F. 2d 475, 477–78 (2nd Cir.); *Commonwealth* vs. *Hanley* 337 Mass. 384, 387, 149 N.E. 2d 608, 66 A.L.R. 2d 222; *United States* vs. *Simmons*, 338 F. 2d 804, 808 (2nd Cir.); *United States* vs. *Chase*, supra; *Bishop* vs. *Commonwealth*, 352 Mass. 258, 225 N.E. 2d 345; *People* vs. *Winfrey*, supra; *Pitts* vs. *North Carolina*, supra.

If prejudice were necessary, one need not look for it in this case. The effects of incarceration without prospects of parole, without the possibility of concurrent sentences, without the opportunity of participating in prison-earning programs that would permit restitution and withdrawal of charges, without numerous other prison privileges that are subject to custodial restrictions of detainers, plus the deleterious psychological effect on rehabilitation and personal reformative efforts because of impending warrants or detainers—the effects of all these restrictions are prejudicial enough, even without considering the effect of the delay on the accused's right to a meaningful day in court on the merits of the case. In *State* vs. *Johnson*, 231 N.E. 2d 353 (Ct. Comm. Pl. Ohio 1967), the court succinctly pointed out the inherently prejudicial aspects of delay with reference to an out-of-state prisoner:

> The Founders of Our State and Nation considered the right to a speedy trial so basic to justice they enshrined it in our Constitution. Certainly there is merit to the truism that justice delayed is justice denied. Anyone who has sat on a trial bench is acutely aware of the fact that the longer the day of trial is delayed after the event, the more difficult, if not impossible, it becomes to ascertain the truth. Not only do witnesses disappear, but testimony becomes "pat" and the detailed recollections so vital to a determination of credibility and to effective examination and cross-examination is gone.
>
> Furthermore, to permit prosecuting authorities to delay the prosecution of a pending charge is to permit them to interfere with responsibilities vested in the corrective authorities and parole boards. It is the latter's duty to so design the prisoner's program that when, as he inevitably will [be], the prisoner is released, hopefully he will become a constructive member of society. It is also their duty, since most jurisdictions have indeterminate sentences, to decide when the prisoner should be paroled. All this is thwarted when detainers or warrants are filed and outstanding charges hang over the prisoner's head. This evil has been recognized by many courts.

C. The Winfrey, Pitts, Shank, and Smith Cases

Four recent cases decided after *Klopfer* are peculiarly appropriate to the resolution of the issue in this case. While some involve greater delays than that endured by the Defendant in this case, all involve detainers or warrants against out-of-state convicts, are similar in many factual details, and contain a thorough analysis of the right to a speedy trial under federal standards.

1. In *People* vs. *Winfrey*, supra, a motion to dismiss a New York charge against an Alabama convict was granted by the trial court, reversed by an intermediate court, and granted upon appeal to the New York State Supreme Court. The people offered as justification for delay the fact that Winfrey was imprisoned in Alabama. In quickly disposing of this argument the Court noted that Nassau County, New York, authorities failed to take any steps to secure the release of the defendant and his return to New York for trial, either before or

after the indictment in New York. The people further argued that a request to Alabama for the prisoner would have been dubious in result. The Court noted that while Alabama was not a party to the Uniform Agreement on Detainers, Alabama did make provision for transfer of defendants to other states in the discretion of the Governor. The Court stated:

> It is, moreover, a relatively simple matter to request the Governor of a Sister State to turn over a prisoner; and there is no contention that if such a request is made and rejected a delay in bringing the prisoner to trial in New York occasioned by his foreign imprisonment would be unreasonable. The point is that in this case no effort of any kind was made; consequently, the People have failed to establish good cause. * * *

In reaching the heart of the issue itself, that the constitutional right to a speedy trial was violated, the Court stated as follows:

> From a constitutional aspect, it appears that the delay in prosecuting defendant prior to his indictment, but after the initiation of criminal proceedings (by detainer), deprived him of due process of law. * * * It may be that this doctrine has now been incorporated in the "speedy trial" guarantee of the Sixth Amendment pursuant to the *Klopfer* trial rule; but it is only of limited analytical importance whether the right is one of a "speedy trial" or of "due process of law". In either event, this delay * * * which is unjustified and is explained only by defendant's imprisonment in Alabama, is unreasonable, since no effort was made to secure the defendant's release or transfer. * * *
>
> Merely mechanical distinctions are not involved. There is no proper criminological purpose served in holding several prosecutions over a defendant's head. Once having instituted the prosecution by [serving a] detainer or warrant * * * [there is not] a reasonable ground for delay. Refusal by another jurisdiction to surrender the defendant would, of course, be an excuse. All the People would have to do is make the request, sincerely, for the surrender—a letter would do.

2. In *Pitts* vs. *North Carolina*, supra, the prisoner served a sentence in South Carolina and was then transferred to North

Carolina to face a detainer which had been lodged against him several years before. He was convicted in North Carolina, received another lengthy sentence and did not appeal his conviction; he did, however, subsequently file a petition for writ of habeas corpus in the Federal District Court. The petition was denied on the grounds that Pitts had failed to show prejudice by the delay. The Fourth Circuit Court of Appeals reversed and ordered Pitts' release. In the opinion by Judge Sobeloaf, the Court reviewed the law applicable to the constitutional right to a speedy trial. The Court noted the often-used rationale for justifying delay on grounds of sovereignty, and disposed of this rationale as follows:

> The attempted justification for the State's failure for so long to bring Pitts to trial is that a defendant imprisoned in another jurisdiction has no right to a prompt hearing. This view, once entertained by some federal and state courts, was founded on the inability of one jurisdiction to require another as a matter of right to relinquish custody of a prisoner wanted for trial. * * * The dubious theory appears to have been that since a request for custody might not be honored, the prosecutors have no obligation to make the request in the first place. As one commentator observed over a decade ago: "In the past, this denial (of a right to a speedy trial) may have been justified in view of the legal uncertainties of extradition and the difficulties of travel and communications. But these problems have largely disappeared". Note: 57 Colum. L. Rev. 846, 865 (1957).
>
> In recent years, a rapidly expanding number of state and federal cases have produced a clear trend rejecting this doctrine and demanding a showing of due diligence by prosecutors to secure the presence for trial in their own jurisdiction[s] of an accused imprisoned or held for a substantial period in another jurisdiction. * * *
>
> Similarly in cases involving sister states, courts have found it constitutionally necessary for prosecutors to make reasonable efforts to extradite for speedy trial prisoners held in another state. * * * These courts reason that since most state executives have discretionary power upon request of another sovereignty to release a prisoner for a purpose of trial, state prosecutors are under a duty to seek a temporary conditional release in an attempt to

> bring the defendant promptly to trial. Recognizing that denial of the request by the imprisoning state would constitute a valid excuse for delay in the demanding state, these cases insist upon at least a good faith-effort by the prosecutors. * * *

3. The third case, *Colorado* vs. *Shank* (1968), has specific applicability to the instant case. In *Shank,* the Denver District Court, in granting the defendant's motion to dismiss, ruled that the District Attorney must sincerely attempt to bring a defendant to trial even though he is confined in a penitentiary in another state, even though he (the District Attorney) anticipates difficulty in securing the right to extradition from the imprisoning state, and even though there is no demand on the accused's part. The court pointed out that Colorado and Nebraska (the imprisoning state) are geographical sister states and that little expense, time and inconvenience would have been involved in exercising due diligence to request the temporary extradition from the Governor of Nebraska.

4. In *Smith* vs. *Hooey,* 393 U.S. 374 (1969), an even more recent case to which the defendant has had but limited access, the United States Supreme Court held that an accused imprisoned by his own jurisdiction did not *ipso facto* forfeit his right (i.e., his constitutional right) to a speedy trial in another jurisdiction. Many courts (e.g., the Colorado Supreme Court) have adopted this decision.

D. Conclusion

The delay or inaction since the defendant has been incarcerated in the Nebraska Penal and Correctional Complex at Lincoln, Nebraska, is without justification in this case. Little expense, time and inconvenience would have been involved in affording the defendant a right to a speedy trial by requesting the Governor of Nebraska to allow his temporary extradition. At least since August, 1969, when the Prosecuting Attorney had actual knowledge of the defendant's incarceration in the Nebraska Penal Complex and in view of his correspondence with the defendant, timely efforts should have been made for transferring him to Eastern District of Illinois for purpose of prosecution. The right to a speedy trial is granted to everyone ever accused; a convict is no exception. In fact, the mere existence of the detainer during the period of delay is prejudicial, re-

strictive and punitive, giving the jurisdiction which issues the detainer or warrant a *de facto* power of punishment over the accused in advance of prosecution and in spite of possible acquittal on the charge.

The true measure of the dimension of the right to a speedy trial is its applicability to the most ostensibly undeserving defendant in the most insignificant case. The defendant in this case is far from undeserving and this case is far from insignificant to him. It is therefore respectfully requested that the defendant's Motion to Dismiss be granted.

Respectfully submitted,

(S) A. WENDELL WHEADON,
Attorney for Defendant,
Welch, Wheadon & McCaskill,
Attorneys at Law,
310 N. 10th St., Suite 100,
East St. Louis, Illinois 62201.

[Proof of service omitted in printing]

In the United States District Court for the Eastern District of Illinois

Document No. 16

Criminal No. 70–44

Section 2312, Title 18, United States Code

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER, DEFENDANT

Answer to Defendant's Motion To Dismiss Indictment for Failure To Prosecute—Filed March 8, 1971

Now comes Henry A. Schwarz, United States Attorney for the Eastern District of Illinois, by Ronald A. Lebowitz, Assistant United States Attorney, who moves that the defendant's motion to dismiss the indictment in the above styled case on grounds of failure to prosecute and bring defendant to a speedy trial be denied for the following reasons:

1. The incident in question occurred on or about June 30, 1969.

2. Investigation on the case was initiated by the Federal Bureau of Investigation, predicated upon the discovery of the vehicle in question in Mt. Vernon, Illinois on or about July 12, 1969.

3. The defendant was arrested and held in custody in Nebraska on a state charge of burglary on July 24, 1969.

4. On a plea of guilty to the reduced charge of grand larceny in state court, the defendant was sentenced from 1–3 years in the state penitentiary on September 16, 1969.

5. On September 3, 1969 the defendant was interviewed by agents of the Federal Bureau of Investigation at Box Butte County Courthouse, Nebraska.

6. On October 20, 1969, the case report of the Federal Bureau of Investigation was filed in Springfield, Illinois.

7. On or about the 17th of December, 1969, the United States Attorney for the Eastern District of Illinois received correspondence from both the Federal Bureau of Investigation and the United States Attorney for the District of Nebraska that the defendant desired to enter a plea to the charge under Rule 20, Federal Rules of Criminal Procedure.

8. On or about December 18, 1969, Jeffrey F. Arbetman, Assistant United States Attorney for the Eastern District of Illinois, mailed the following items to the office of the United States Attorney, District of Nebraska:

a. Transfer notice
b. Waiver of Indictment forms
c. Consent to Plead under Rule 20 forms
d. Proposed informations

9. On or about March 18, 1970, the United States Attorney for the Eastern District of Illinois advised the Federal Bureau of Investigation that he considered presenting the matter to the Grand Jury. He advised that he would further await some acknowledgement from the United States Attorney in Nebraska to ascertain if the return of an indictment was necessary.

10. On May 26, 1970, after no correspondence concerning the defendant's prior request to enter a plea under Rule 20 was received from Nebraska, the United States Attorney for the Eastern District of Illinois presented this matter to the Grand Jury and an indictment was returned.

11. On August 13, 1970, a letter was received from the United States Attorney, District of Nebraska, stating that the defendant definitely refused to enter a plea under Rule 20 and that the defendant intended to raise the issue of speedy trial.

12. On August 24, 1969, the United States Attorney's Office, District of Nebraska received a letter from the defendant. The defendant acknowledged receipt of notification of transfer to the Eastern District of Illinois and wished to discuss the matter, expressing a lack of understanding as to the meaning of the notice. The letter referred to his being interviewed by the Federal Bureau of Investigation, and states that timeliness seems to be lacking.

13. On February 16, 1971, a Writ of Habeas Corpus ad Prosequendum for the production and delivery of the defendant was filed in the Eastern District of Illinois.

14. The Government alleges that the indictment in the above case was returned well within the Statute of Limitations.

15. In order to sustain the issue of speedy trial, it must be shown that any delay must be purposeful or oppressive. *Pollard* vs. *United States*, 352 U.S. 354, 361 *United States* vs. *Ewell*, 383 U.S. 116, 120. The defendant has failed to make such a showing.

16. To preserve the issue of speedy trial, the defense must file a demand for the same. In fact, the defendant in the first instance demanded not a speedy trial but requested to enter a plea of guilty under Rule 20. It was not until 8 months later that it was definitely ascertained that the defendant refused to enter such a plea. The Government denies that the defendant's reference to timeliness in advancing the charge in the letter to the United States Attorney, referred to above, amounts to a motion for a speedy trial, and the record does not reflect any motion filed by the defendant with the court.

17. In the case of *United States* vs. *Deloney*, 398 F 2d 324 (7 Cir.), the court held that the Statute of Limitations is not the exclusive test of whether preindictment delay is so prejudicial to the defendant as to warrant dismissal of prosecution. (Rule 48b, Federal Rules of Criminal Procedure). The Government contends that the defendant must show something else other than mere time to establish prejudice. The defendant has failed to do so.

18. In the case of *United States* vs. *Lee*, 413 F 2d 910 (7 Cir.) where the indictment in the cause followed the incident in

question by 21 months, where the defendant claimed that two of his witnesses had deceased in the interim, but where their deaths were not alleged in pretrial motions, the court ruled that the pretrial motion failed to show prejudice that was sufficient to require dismissal of the indictment, and that the accused had failed to prove that delay prejudiced his case.

19. In no way has the defendant prior to, or in the body of the present motion shown how he has been prejudiced by the period of time that has elapsed, a period of time that was partially due to the defendant's own request.

WHEREFORE, for all of the above reasons, the Government respectfully moves that the defendant's motion be denied.

Respectfully submitted,

HENRY A. SCHWARZ,
United States Attorney,
(S) By RONALD A. LEBOWITZ,
Assistant United States Attorney.

In the United States Court of Appeals for the Seventh Circuit

September Term, 1971

April Session, 1972

No. 71–1466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE EUGENE STRUNK, a/k/a ALBERT GARDNER WAGNER, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of Illinois

No. 70–44
WILLIAM G. JUERGENS, *Judge*

Argued May 30, 1972—Decided August 16, 1972

Before SWYGERT, *Chief Judge,* STEVENS and SPRECHER, *Circuit Judges.*

SWYGERT, *Chief Judge.* At the conclusion of a one-day jury trial, appellant-defendant Clarence Eugene Strunk was found

guilty of transporting on July 1, 1969 a stolen Oldsmobile station wagon from Oconomowoc, Wisconsin to Mount Vernon, Illinois in violation of 18 U.S.C. § 2312. The defendant was given a five-year sentence to run concurrently with one that he was then serving in the Nebraska State Penitentiary. The defendant appeals from his conviction alleging as the single ground for reversal the denial of his constitutional right of a speedy trial.

The following is a narration of the pertinent facts. On July 24, 1969 the defendant was arrested and held in custody of state authorities in Nebraska on a charge of burglary. On a plea of guilty to a reduced charge of grand larceny in a Nebraska state court, a sentence of one of three years was imposed.

While in custody of the state authorities the defendant was interviewed on September 3, 1969 by an agent of the Federal Bureau of Investigation. After receiving Miranda warnings, the defendant discussed with the agent the facts relating to the transportation of the car which is the subject matter of the instant prosecution. The defendant advised the agent that it was defendant's intention to "demand a speedy trial under Rule 20; and that was why he wanted to get this case cleaned up at the time I talked to him."

According to the record, "the case report of the Federal Bureau of Investigation was filed in Springfield, Illinois" on October 20, 1969, and on December 17 the United States Attorney for the Eastern District of Illinois received correspondence from the United States Attorney for the District of Nebraska which indicated that the defendant "desired to enter a plea to the charge under Rule 20, Federal Rules of Criminal Procedure." On the following day, the federal prosecutor sent the requested forms to Nebraska for processing the case under the rule.

Not having received any word whether the case would proceed under Rule 20 in the Nebraska district, the United States Attorney for the Eastern District of Illinois presented the matter to a grand jury in the latter part of May 1970. An indictment was returned on May 26.

Next the record reveals that on August 13, 1970 the United States Attorney for the District of Nebraska wrote his counterpart in Illinois that the defendant "definitely refused to enter a plea under Rule 20 and that the defendant definitely intended to raise the issue of speedy trial." Thereafter nothing happened until February 9, 1971, when the defendant, having been

brought to East St. Louis on a writ of habeas corpus ad prosequendam, was arraigned in the district court for the Eastern District of Illinois. At the arraignment, counsel was appointed for the defendant, and, after a not guilty plea, the trial was set for March 29, 1971.

Prior to the trial, defendant's counsel moved for a dismissal of the indictment pursuant to FED. R. CRIM. P. 48(b), asserting that the defendant has been denied a speedy trial as guaranteed by the sixth amendment. Briefs were filed by the parties, and the district judge, after hearing oral argument but without conducting an evidentiary hearing, denied the motion.

Approximately eleven months elapsed between the commission of the crime and the return of the indictment. The defendant, however, raises no issue with regard to the preindictment delay. He concedes that *United States* v. *Marion*, 404 U.S. 307 (1971), forecloses consideration of that issue in his case. The issue he does raise concerns the Government's delay in bringing him to trial after the return of the indictment. The time elapsing between the filing of the charge and the trial was 306 days, or approximately ten months. The defendant contends that when all the circumstances are considered he was not offered a speedy trial and that the district judge erred in not dismissing the indictment.

Initially, it must be observed that the record is scanty on the issue before us. No voir dire evidentiary hearing was conducted. Most of the facts must be gleaned from the docket entries and the briefs filed in the district court in support of and in opposition to the motion to dismiss. Nevertheless, while we considered remanding for an evidentiary hearing, we have concluded that the issue can be decided based upon the record before us and the oral argument. We do, however, emphasize that the better practice would be for the district court to conduct an evidentiary hearing upon a motion under Rule 48(b), and to make findings in ruling on the motion.

Recently, the Supreme Court in *Barker* v. *Wingo*, 40 U.S.L.W. 4840 (U.S. June 20, 1972), had occasion to speak at length on the exact question before us. After acknowledging the uncertainty which courts experience in protecting the right of a speedy trial, the Court nevertheless rejected as overrigid two approaches urged upon it as a means of clarifying the issues. One approach was that a trial be offered the defendant within a specified time. On that point Mr. Justice Powell

said, "[W]e can find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." 40 U.S.L.W. at 4843.

The second approach relates to what is designated the "demand-waiver" doctrine, which "provides that a defendant waives any consideration of his right to a speedy trial for any period to which he has not demanded a trial." 40 U.S.L.W. at 4844. After indicating that the waiver of the right to a speedy trial should be gauged with the same severity as is the waiver of other fundamental rights guaranteed by the Constitution, the Court found the demand-waiver doctrine unacceptable, saying, "We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." 40 U.S.L.W. at 4845.

As an alternative of the two rejected approaches—a fixed-time rule and the demand-waiver doctrine—the Court adopted a "balancing test" whereby the conduct of both the prosecutor and the defendant are weighed. Among the factors that courts should consider in applying the test, four were specifically identified: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Mr. Justice Powell proceeded to elaborate some of the considerations which might be relevant in evaluating each factor. The Court stressed the fact that the balancing approach necessarily requires that each case be determined on an *ad hoc* basis.

Although *Wingo* was decided after this case was briefed and argued, we are obligated to follow its teachings and apply it to the record before us.

Although the length of delay in bringing the defendant to trial, ten months, might not be deemed inordinate in some cases (for example, a complicated multi-defendant prosecution) it is critical here in light of the simple nature of the case and the factors to which we shall refer. It should be stressed at the outset that while the time between arraignment and trial, February 9 to March 29, 1971, does not appear to be unreasonable, the time between indictment and arraignment, May 26, 1970 to February 9, 1971 is unusual and calls for explanation as well as justification.

The explanation offered by the Government for the delay in the arraignment is that until August 13, 1970 the United States Attorney was waiting for word from the defendant as to whether

he was going to proceed under Rule 20 in the Nebraska federal court. The Government argues it should not be charged for that period of the delay—seventy-nine days. The only excuse offered by the United States Attorney for the balance of the delay in setting the arraignment date is that his office was understaffed.

We do not accept either of these explanations. As to the first, it must be emphasized that the defendant did not have counsel until his arraignment. What he may have understood about Rule 20 without legal advice is a matter of conjecture, but it does appear that he misapprehended its requirement of a guilty plea before it may be invoked in the transferee court. This is evidenced by his statement to the FBI agent in September 1969 that he intended to "demand a speedy trial under Rule 20." Whatever the facts may have been, we do know that the United States Attorney, after sending the necessary papers for transferring the case under Rule 20 in December 1969 and not hearing further, decided to present the case to the grand jury in the latter part of May, 1970.* We regard as extremely tenuous the United States Attorney's argument that he was still waiting for word from the defendant after May 26 in view of the fact that after he did hear from the defendant in August he made no move to set the arraignment date for six more months. Moreover, we summarily reject the additional reason advanced for the delay, the characterization of the United States Attorney's office as understaffed.

Although the defendant may have contributed to some of the delay in bringing the indictment by considering the invocation of Rule 20, he certainly contributed nothing to the delay thereafter. If his statements to the prosecution authorities mean anything, they indicate that rather than postponement he desired a speedy disposition of his case.

Appellant's counsel candidly admits that the delay in bringing the defendant to trial did not cause any prejudice with respect to the defense of the case. The prejudice lies, it is claimed, in delaying the commencement of his federal sentence. Since the sentence he received, the maximum term of five years, was to run concurrently with the one-to three-year sentence he was serving in the Nebraska State Penitentiary, defendant argues

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*In addition, there is nothing in the record to indicate that the defendant was ever notified of the indictment prior to the issuance of the writ of habeas corpus ad prosequendam.

that the delay deprived him of the possibility of crediting the 306 days between indictment and trial to both sentences. In other words, he argues that he received in effect the maximum sentence plus 306 days. His argument is weakened by the possibility that the sentencing court might have postponed commencement of his federal sentence until after he had served his state sentence. On the other hand, the Supreme Court addressed itself to this very problem in *Smith* v. *Hooey*, 393 U.S. 375 (1969). There the Court said:

> Suffice it to remember that this constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: "(1) to prevent undue and oppressive incarceration prior to trial. * * * "

The Court then observed:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. 393 U.S. at 377.

After balancing the various factors outlined in *Wingo*, we conclude that the defendant was denied a speedy trial to his prejudice.

The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. In

these circumstances, the vacation of the sentence and a dismissal of the indictment would seem inappropriate. Rather, we think the proper remedy is to remand the case to the district court with direction to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment. FED. R. CRIM. P. 35 provides that the district court may correct an illegal sentence at any time. We choose to treat the sentence here imposed as illegal to the extent of the delay we have characterized as unreasonable.

The cause is remanded with direction. The mandate shall be issued forthwith.

In the United States Court of Appeals for the Seventh Circuit

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August 16, 1972

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of Illinois

Before Hon. LUTHER M. SWYGERT, Chief Judge,
Hon. JOHN PAUL STEVENS, Circuit Judge,
Hon. ROBERT A. SPRECHER, Circuit Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REMANDED, with directions, in accordance with the opinion of this Court filed this day.

IT IS FURTHER ORDERED that the mandate of this Court issue forthwith.

In the District Court of the United States for the Eastern District of Illinois

Criminal No. 70–44

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EUGENE STRUNK, AKA, ALBERT GARDNER WAGNER, DEFENDANT

Order on Remand—Filed August 29, 1972

In accordance with the decision and mandate of the United States Court of Appeals for the Seventh Circuit issued August 16, 1972, No. 71–1466, and for the reasons set forth therein, IT IS ORDERED AND ADJUDGED that the Attorney General or his authorized representative credit the defendant, Clarence Eugene Strunk, a/k/a Albert Gardner Wagner, with the period of time elapsing between the return of the indictment and date of arraignment, a total of 259 days. This credit shall apply to the sentence of imprisonment for a period of five years heretofore imposed in the United States District Court for the Eastern District of Illinois at East St. Louis on May 4, 1972.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this order to the United States Marshal and to the Attorney General.

JAMES L. FOREMA,
United States District Judge.

In the United States Court of Appeals for the Seventh Circuit

September 7, 1972

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE EUGENE STRUNK, ETC., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of Illinois

Before Hon. LUTHER M. SWYGERT, *Chief Judge,* Hon. JOHN PAUL STEVENS, *Circuit Judge,* Hon. ROBERT A. SPRECHER, *Circuit Judge*

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that said petition for rehearing be and the same is hereby denied.

In the Supreme Court of the United States

No. 72–5521

CLARENCE EUGENE STRUNK, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be and the same is hereby, granted.

January 8, 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973